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FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Jobbers, as modified by Holiday Tours.[4/] Thus, in order to obtain a stay of the Bureau's 800 Database Tariff Order, GTE and United must each show that (1) it is likely to prevail on the merits of its review (by the Commission or the Courts); (2) it will suffer irreparable harm absent a stay; (3) others will not be harmed by grant of the stay; and (4) the public interest supports grant of the stay.[5/] Because both GTE and United fall short of sustaining their substantial burden on any of the four factors, their requests must be denied.

I. GTE AND UNITED ARE NOT LIKELY TO PREVAIL ON THE MERITS

GTE and United must show a strong likelihood of prevailing on the merits, since "[w]ithout such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review."[6/] Neither party has made that required showing.[7/] GTE claims that:

> There are at least two reasons why the Bureau's directive that the GTOCs implement the Bureau-determined rates will be set aside on review by either this Commission or the Court: (1) the Bureau ordered a reduction in GTOCs rates without, as required by Section 205, giving the GTOCs a "full opportunity for hearing," (2) the Bureau exceeded its "partial suspension" authority under Section 204(a) when it forced the GTOCs to provide service at rates below the GTOCs' costs.[8/]

[4/] GTE at 5, United at 2-3. See, Virginia Petroleum Jobbers Association v. FPC, 259 F. 2d 921, 925 (D.C. Cir. 1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841, 943 (D.C. Cir. 1977).

[5/] Id.

[6/] Virginia Petroleum Jobbers, 259 F. 2d at 925.

[7/] GTE misinterprets the Holiday Tours decision, alleging that a strong case for irreparable harm to GTE will invoke use of a less stringent standard for success on the merits. GTE at 5-6. In fact, the Holiday Tours decision modified this requirement such that, if the other three factors "tip sharply" in favor of the moving party, then only a "substantial case on the merits" or demonstration of "an admittedly difficult legal question" need be shown. 559 F. 2d at 843-44. Thus, the showing required under the first criterion varies according to the assessment of the other three factors. Enforcement of Prohibitions Against Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd 3672, 3673 (1987). Although both GTE and United argue otherwise, they have failed to demonstrate a case of any strength on the other three factors. Thus, they must show probable success on the merits, not merely a "substantial case on the merits."

GTE also argues, but does not provide any basis in law or fact, for use of a less stringent standard of review at the agency level. GTE at 6.

[8/] GTE at 6.

United claims that the Bureau's use of a "statistical analysis and a mean rate cannot stand as a substitute for an investigation."[9/] Thus, United asserts that the Bureau's methodology for assessing the amount of its disallowance was "arbitrary, capricious and unreasonable,"[10/] and "constitutes confiscatory ratemaking."[11/] United bases its conclusion on its own analysis, not previously submitted to the Bureau, which it claims conflicts with and, therefore, invalidates the Bureau's decision.

Both GTE and United ignore the fact that, as a threshold issue, the tentative disallowance of a part of the costs underlying the proposed rates is an interlocutory decision. Section 1.106(a)(1) of the Commission's Rules applies to "final actions taken pursuant to delegated authority," and thus precludes reconsideration of interlocutory rulings.[12/] That a tentative disallowance is interlocutory and, thus, unreviewable, was made clear by the Commission in

204,[15] which provides the Commission and the Bureau with far more flexibility than GTE seems to understand and permits the partial rate authorization in the 800 Database Tariff Order. Such a tentative authorization hardly amounts to a prescription of rates.

GTE alleges that the Congress, in enacting Section 204(a)(1), intended it to apply only to rate changes for existing services.[16] However, the language cited by GTE discusses tariff changes generally, without any distinction between implementing new rates or changing the rates for existing services.[17] In any event, basic 800 access is a restructured service and, therefore, is, in effect, an increase to charges for existing services.[18]

Moreover, Section 204 never required the Bureau to "engage in a pointless charade in which carriers . . . are required to submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect."[19] An example of the Commission's authority under Section 204(a) occurred in 1975, when the Commission was investigating the appropriate prospective rate of return for AT&T. The Commission allowed AT&T to increase its rate of return and its rates only to the level of an approved interim rate of return, pending the investigation into the appropriate prospective rate of return.[20]

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[15] 800 Database Tariff Order at 19.

[16] GTE at 9-10.

[17] GTE cites language from a letter to Congress by Commission Chairman Wiley which refers to tariff changes. GTE at 9-10. The letter in no instance limits its discussion of "changes" to rates for existing services.

[18] The Commission determined that basic 800 access should be treated as a restructured, rather than a new service. See, Provision of Access for 800 Service, Second Report and Order, CC Docket No. 86-10, FCC 95-53, released January 29, 1993 (800 Access Order) at para. 26. For a description of restructured services as compared to new services, see, also, Policy and Rules concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6789 (1990); erratum, 5 FCC Rcd 7664 (1990); partial recon., 6 FCC Rcd 2637 (1991).

[19] Direct Marketing Ass'n Inc. v. FCC, 772 F. 2d 966, 969 (D.C. Cir. 1985) (quoting Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 653 (1978).

[20] AT&T, 51 FCC 2d 619, 627 (1975).

Thus, under 204(a), the Commission was able to allow into effect less than the full charges contained in the carrier's original filing, without entering a prescription. Additionally, the Commission could do so subject to its investigation of the reasonableness of the remaining proposed rate.

An additional claim made by United is that the Bureau exceeded its authority, i.e., acted in an arbitrary and capricious manner, by using statistical average methodology in allowing only a portion of the rates to go into effect.[21/] Both GTE and United propose other methods of analysis under which their rates may not have been suspended.[22/] These arguments are unpersuasive.

The burden of supporting filed rates rests with the carrier filing the rates.[23/] Further, the Commission only narrowly determined that it was appropriate to grant any exogenous treatment of costs whatsoever, as 800 database access is a restructured service.[24/] Thus, the Commission warned the carriers that it would be conducting an even more strict review of the 800 database costs to assure that they were reasonable.[25/] Nevertheless, GTE and United failed to explain many of the assumptions and cost allocations supporting their rates.[26/]

[21/] United at 3.

[22/] GTE at 8, United at 4-5.

[23/] See, e.g., Investigation of Access and Divestiture Related Tariffs, CC Docket Nos. 78-72 and 83-1145, Memorandum Opinion and Order, FCC 84-201, released May 10, 1984, paras. 13-14, 54.

[24/] 800 Access Order at para. 26.

[25/] Id. at 27.

[26/] 800 Database Tariff Order at para. 16. See, e.g., In the Matter of Provision of Access for 800 Service, Ameritech Operating Cos., Tariff FCC No. 2, Transmittal No. 698, et. al., MCI Petition for Rejection and Suspension and Investigation, filed March 18, 1993 (MCI Petition). See, also, Petitions filed by Allnet Communications Services, Inc., AT&T, Ad Hoc Telecommunications Users Committee, Aeronautical Radio, Inc., CompuServe, Inc., California Bankers Clearing House Association, Mastercard International Incorporated, the New York Clearing House Association, and Visa, U.S.A, Inc., First Financial Management Corporation, MCI, National Data Corporation, Sprint Communications Company L.P. and International Communications Association against Ameritech Operating Cos., Tariff No. 2, Transmittal No. 698, et. al., filed March 18, 1993.

Many of the other LECs' proposed tariff rates may be overstated as well, as the Bureau determined that they raised substantial questions of lawfulness with respect to cost allocations and resulting rate levels.[27] Without the requisite support from the LECs, the Bureau had no alternative but to suspend and investigate the LECs' rates.[28] Although the Bureau allowed many of the other, possibly overstated rates to go into effect on one day's suspension, it determined that it needed to put some upper limit on the amount that carriers could charge in order to protect the interests of customers. Thus, the Bureau ordered the partial suspensions of GTE's and United's rates in the 800 Database Tariff Order based on the reasonable determination that the costs for 800 database should be similar for all carriers owning their own SCPs "since all LECs are deploying similar data base systems."[29]

Using the mean rate as a benchmark, with a margin for error of one standard deviation, to evaluate LEC proposed rates was a logical method of assessing the preliminary reasonableness of United's and GTE's proposed rates.[30] The Commission has consistently and reasonably used statistical validation methods in the past for its Annual Access Filing review.[31]

United asserts that the Bureau's decision is arbitrary as it will result in United not being able to recover its costs for 800 database access service.[32] It bases its allegation on the proposition that the Bureau should have used other measurements and benchmarks preferred

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[27] 800 Database Tariff Order at para. 16.

[28] Id. at para. 16.

[29] Id. at para. 19.

[30] Additionally, the Commission determined that United had improperly included overhead costs in its exogenous costs. Id. at para. 17. Thus, the Commission had even more evidence that the rates filed by United were excessive.

[31] See Annual 1988 Access Filings, 3 FCC Rcd. 1281 (1987), Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638 (Com.Car. Bur. 1989).

[32] United at 3, 7.

by United to assess the reasonableness of its rates.[33] The Bureau's order cannot be considered "arbitrary" simply because it used one reasonable set of criteria for its preliminary review that is not preferred by the carriers that are identified as having filed excessive rates.

In conclusion, the Bureau's decision is interlocutory, and a reasonable exercise of its authority under Section 204(a). Thus, GTE and United are likely to be defeated on the merits if they seek review of the 800 Database Tariff Order and, therefore, they fail to meet the first criterion for granting a stay.

II. GTE AND UNITED WILL NOT BE IRREPARABLY HARMED IN THE ABSENCE OF A STAY

To demonstrate irreparable harm, a petitioner must show a strong likelihood that the injury will occur: "the injury must be both certain and great; it must be actual and not theoretical ... [T]he party seeking injunctive relief must show that '[t]he injury complained of [is] of such imminence that there is a "clear and present" need for equitable relief to prevent the harm.'"[34]

It is well settled that economic loss does not, in and of itself, constitute irreparable harm."[35] Instead, a petitioner must show, in effect, that the viability of its very business would be placed in jeopardy.[36] There is no evidence that either GTE's or United's businesses will suffer irreparable injury under this standard.

In fact, GTE and United have not shown any irreparable harm apart from that inherent in any suspension of proposed tariff rates. Congress has appropriately limited the suspension power to five months to allow the Commission flexibility in protecting customers, while assuring

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[33] United at 4-6.

[34] Wisconsin Gas Co. v. Federal Energy Regulatory Com'n, 758 F. 2d 669, 674 (D.C. Cir. 1985) (quoting Ashland Oil Inc. v. FTC, 409 F. Supp 297, 307 (D.D.C.) aff'd, 548 F. 2d 977 (D.C.Cir. 1976) (emphasis in originals).

[35] Wisconsin Gas, 758 F. 2d at 674.

[36] Holiday Tours, 559 F. 2d at 843 and n. 2.

that it does not abuse its authority.[37] It did so with full knowledge that carriers would not be

be found excessive, eliminates the potential for others to be harmed if a stay is granted.[41/] They effectively propose that the refund capability makes the factor of harm to other parties irrelevant, no matter how excessive the rate or how little cost support is provided. This is simply not true.

800 portability is, for the first time, opening the 800 interexchange market to true competition. Additionally, the Commission has created a 90-day "fresh look" window for AT&T's customers who have service offerings bundled with 800 service, to terminate their contracts without termination penalties.[42/] It is critical that interexchange carriers be able to purchase access at reasonable rates in the early stages of competition. Excessive underlying 800 access rates in GTE and United territories may affect the cost structure, especially for regional applications, and deter IXCs from competing for many newly accessible customers. These carriers may lose out on revenues because it is too risky to rely upon potential refunds after the 90-day "fresh look" window has expired. Marketing to customers whose numbers carry a disproportionate amount of originating traffic from these territories could, therefore, be viewed as unprofitable.

Additionally, as IXCs must cover their costs of 800 access if they are to generate a profit in selling 800 service to their 800 customers, some IXCs may be reluctant to adjust their 800 rates in anticipation of future refunds. Therefore, when access rates are overstated, the entity who absorbs the excessive rate may very well be one that 800 portability is designed to benefit -- the 800 customer. Thus, it is clear that the third factor of harm to others weighs strongly against granting a stay.

[41/] GTE at 12 and United at 7.

[42/] In the Matter of Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880 (Interexchange Competition Order), recon. in part, 6 FCC Rcd. 7569 (1991), further recon., 7 FCC Rcd. 2677 (1992) (Order on Reconsideration).

IV. GRANTING A STAY WOULD BE CONTRARY TO THE PUBLIC INTEREST

As discussed above, the 800 Database Tariff Order serves the public interest by assuring that 800 database service and, ultimately, 800 service in the interexchange market, is provided at reasonable rates. This will promote competition in the interexchange 800 market during its critical infant stage. Thus, the public interest also weighs against granting a stay.[43/]

CONCLUSION

GTE and United have failed to meet their substantial burden of demonstrating the need for the extraordinary remedy of a stay of the Commission's 800 Database Tariff Order. Thus, MCI respectfully requests that the Petition for Stay and Emergency Motion for stay be denied by the Commission.

Respectfully Submitted,
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Dated: May 6, 1993

43/ United claims that the public interest demands that a stay be granted to prevent the confiscatory effect of the 800 Database Tariff Order. United at 7. However, as United has failed to meet its burden of demonstrating that its costs are reasonable, 800 Database Tariff Order at para. 16 - 18, United should not be allowed to now claim that the rate is below cost.

CERTIFICATE OF SERVICE

I, Susan Travis, do hereby certify that copies of the foregoing MCI Opposition to Emergency Motion for Stay and Petition for Stay were sent via first class mail, postage paid, to the following on this 6th day of May, 1993:

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